

**DEPARTMENT OF STATE REVENUE**  
**LETTER OF FINDINGS NUMBER 98-0557**

**Withholding Tax**

**For Tax Periods: 1995 Through 1997**

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**Issue**

**Gross Income Tax:** Withholding on Nonresident Contractor

**Authority:** IC 6-2.1-2-2, IC 6-2.1-6-1, IC 6-8.1-5-1 (b),  
45 IAC 1-1-213, 45 IAC 1-1-214, 45 IAC 1-1-215.

The taxpayer protests the assessment of withholding tax on nonresident contractors.

**Statement of Facts**

The taxpayer is a corporation engaged in the processing of food products that it sells to a major fast food chain. During the tax period, the taxpayer contracted with several nonresident contractors to build a new facility in Indiana. The taxpayer did not withhold gross income tax from the payments to these contractors. The Indiana Department of Revenue, hereinafter referred to as the "department," assessed withholding tax after an audit. The taxpayer protested the assessment and a hearing was held. More facts will be provided as necessary.

**Gross Income Tax:** Withholding on Nonresident Contractor

**Discussion**

All tax assessments are presumed to be accurate and the taxpayer bears the burden of proving that any assessment is incorrect. IC 6-8.1-5-1 (b).

Indiana imposes an income tax, known as the gross income tax, upon the receipt of "the taxable gross income derived from activities or businesses or any other sources within Indiana by a taxpayer who is not a resident or a domiciliary of Indiana." IC 6-2.1-2-2. Except as provided in IC 6-2.1-6-1, each calendar year each individual, firm, organization, or governmental agency of

any kind who makes payments to a nonresident contractor for performance of any contract, except contracts of sale, shall withhold from such payments the amount of gross income tax owed upon the receipt of those payments under this article. IC 6-2.1-6-1.

These statutory requirements are further described and clarified at 45 IAC 1-1-213 in effect during the audit period that states as follows:

Indiana gross income tax is required to be withheld from any and all payments made to a nonresident contractor for performance of any work or services which are taxable to the State of Indiana. The withholding will be made at the higher rate under IC 6-2-1-3(g) on all payments made during the year to a nonresident contractor which exceed the sum of \$1,000.00.

The term “nonresident contractor” is defined at 45 IAC 1-1-214, in effect during the tax period as follows:

A nonresident contractor is any corporation, including partnerships and joint ventures with a corporate partner, either for profit or not-for-profit . . . which is not qualified with the Indiana Secretary of State to conduct business in the State of Indiana and which performs any work or service of any kind in the State of Indiana.

Pursuant to 45 IAC 1-1-215 in effect during the tax period, work or service performed in Indiana includes “construction contracts of any kind” and “contracts for the furnishing and installation of any tangible personal property.”

During the tax period, the taxpayer was a corporation doing business in Indiana. It made payments to out-of-state contractors who were not registered with the Indiana Secretary of State and performed work or service in Indiana by constructing the factory and furnishing and installing the machinery. The law, as clarified in the applicable regulations, required that the taxpayer withhold gross income tax on these payments that it made to the nonresident contractors.

The taxpayer contends that the assessments were for exempt contracts of sale rather than construction contracts or contracts for the furnishing and installation of tangible personal property. In support of its contention, the taxpayer offered legal arguments and definitions of contracts for sale. The taxpayer did not, however, offer any documentary evidence that the transactions in this case were actually contracts of sale rather than the furnishing and installation of tangible personal property. Therefore, the taxpayer did not sustain its burden of proof.

Alternatively, the taxpayer argues that the department should examine the individual contracts to determine the gross income tax rate applicable to that payment. The internal documents submitted by the taxpayer did not, however, provide proof that the transactions were contracts of sale or verifiable breakdowns of the sales of tangible personal property and services. The applicable regulation for out-of-state clearly states that the withholding is to be made at the higher rate for all payments above \$1,000.00. The taxpayer did not sustain its burden of proof

that it qualified for any of the statutory exceptions. The taxpayer did not withhold in the required manner.

**Finding**

The taxpayer's protest is denied.

KA/JM/MR--021909